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No. 82-330

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

JADAIR, INC.,

Petitioner,

v.

THE WALT KEELER COMPANY, INC.,

Respondent.

ON PETITION FOR A
WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Does it offend Due Process concepts of "fair play and substantial justice" to require a Kansas buyer of machinery to defend a declaratory judgment action by a Wisconsin seller in the seller's state of residence, when the buyer's only contact with Wisconsin is that the seller's place of business is located there?

LIST OF ALL PARTIES

All parties respondent appear on the caption. There are no companies affiliated with The Walt Keeler Company, Inc.

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The Respondent, The Walt Keeler Company, Inc., respectfully requests that this Court deny the Petition for a Writ of Certiorari filed by Petitioner

seeking a review of the decision of the Seventh Circuit reported at 679 F.2d 131.

SUMMARY OF ARGUMENT

Certiorari should not be granted because this case presents two atypical fact situations. First, it is an action by a seller for declaratory judgment that the seller is not liable to the buyer for breach of warranty. Second, the jurisdictional amount was challenged below, although not here, indicating that the amount in dispute is unusually low for the federal courts, not to mention the Supreme Court of the United States.

The decision of the Seventh Circuit on the atypical facts of this case does not conflict with decisions by other Circuit Courts of Appeals. What the decision of the Seventh Circuit holds

is that "traditional notions of fair play and substantial justice" are not satisfied by a declaratory judgment action by a seller against a buyer whose sole contact with the forum state was the purchase of a single piece of machinery which happened to be manufactured in that state. This holding is not inconsistent with the decisions of other Circuit Courts of Appeals.

I. A PRONOUNCEMENT BY THIS COURT ON LONG-ARM JURISDICTION OVER BUYERS IN THE CONTEXT OF A DECLARATORY JUDGMENT TO DECLARE A SELLER "FREE OF LIABILITY" WOULD BE OF DOUBTFUL PRECEDENTIAL VALUE.

It would not be an efficient utilization of this Court's scarce and precious resources to first address the issue of long-arm jurisdiction over buyers in a case which could easily be distinguished in "garden-variety" suits. Because of the declaratory judgment

aspect of this case, it is not only possible, but likely, that a decision of this Court, particularly one affirming the decision below, could be distinguished in mine-run cases. Therefore, this Court should not accept certiorari.

The Seventh Circuit specifically noted that this was not a "garden-variety" contract dispute (Pet. App., p. 2) because Jadair, Inc. (hereafter "Seller") launched a jurisdictional preemptive strike by commencing this declaratory judgment action "to declare it free of any liability" for deficiencies in machinery sold by Seller to The Walt Keeler Company, Inc. (hereafter "Buyer"). There can be no serious doubt that this declaratory judgment action was commenced by Seller solely for the purpose of obtaining a jurisdictional advantage over Buyer.

A declaratory judgment action commenced solely for the purpose of obtaining a jurisdictional advantage presents special considerations not present in a routine action by a seller for the price of goods. Courts ought not to encourage race-to-the-courthouse declaratory judgment actions because, contrary to the proper function of a declaratory judgment action, such actions stimulate, rather than resolve, disputes. It is very difficult to argue, as Seller has discovered here, that "traditional notions of fair play" are not offended by such actions. It is certainly not unfair to permit Buyer, who has paid in full for the goods in question, to choose the forum for an action for breach of Seller's completed performance.

The Court's recent denials of certiorari in cases raising the general

issue of long-arm jurisdiction over buyers[1] came in cases which were much more typical suits for the price of the goods sold or for a specific performance of the contract. If the Court wishes to resolve that issue, it may await a more typical case than this one, firm in the knowledge that such an opportunity will be presented sooner rather than later.

Thus, without disputing Seller's contention that the Court should, at some point, resolve the issue of long-arm jurisdiction over buyers,

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[1] Mouzavires v. Baxter, 434 A.2d 988 (D.C. Cir. 1981), cert. denied, ____ U.S. ____, 102 S. Ct. 1643 (1982); Iowa Electric Light & Power Co. v. Atlas Corp., 603 F.2d 1301, (8th Cir. 1979), cert. denied, 445 U.S. 911 (1980); Nicholstone Book Bindery, Inc. v. Chelsea House Publishers, 621 S.W.2d 560 (Tenn. 1981), cert. denied, ____ U.S. ____, 102 S. Ct. 1623 (1982).

this is the wrong case for the Court to address the issue.

II. THIS COURT SHOULD NOT CONSIDER THE ISSUE PRESENTED IN THE CONTEXT OF A CASE WHICH BARELY SATISFIES THE JURISDICTIONAL MINIMUM.

Given the limitations upon the number of cases which this Court can consider, it ought, if possible, to select cases to decide which are typical of the class of cases in which the issue to be resolved is presented. This case is not typical as to amount because the jurisdictional amount was disputed below, although it is not raised here.

It is significant to note that the two cases the past term which could have presented this issue, i.e., Mouzavires v. Baxter, 434 A.2d 988 (D.C. Cir. 1981) and Nicholstone Book Bindery, Inc. v. Chelsea House Publishers, 621 S.W.2d 560 (Tenn. 1981), but were rejected,

were also cases involving comparatively small amounts of money.

While, obviously, no one case will be typical of all cases as to the amount in issue, the Court might wish to consider the issue in the context of a case which is typical of federal cases at least. This case is not.

Furthermore, Buyer wishes to point out the irony inherent in Seller's Petition for a Writ of Certiorari. Buyer moved to dismiss this case nearly three years ago on the ground that it was unfair to require Buyer, basically a company with a local business in Wichita, Kansas, to come to Wisconsin, a distant forum, to assert Buyer's claim against Seller for breach. Now, notwithstanding the concurrence of every judge to have considered its motion that it is not fair to require Buyer to assert its claims in

Wisconsin, not only has Buyer been subjected to nearly three years of litigation in that distant forum, Seller now seeks to require Buyer to defend this appeal in the yet more remote forum of this Court. Sadly, one must conclude that, no matter how this Court rules on this motion, Buyer has been subjected to serious injustice. Buyer trusts that the Court will not further compound that injustice by requiring Buyer to address yet one more court before it is <u>finally</u> determined that the very existence of this case is a violation of Due Process.

III. ON THE FACTS OF THIS CASE, THE DECISION OF THE SEVENTH CIRCUIT WAS BOTH CORRECT AND NOT IN CONFLICT WITH OTHER FEDERAL CIRCUITS.

The holding of the Seventh Circuit was simply that a buyer cannot be sued in a state when his "sole contact with [that] state is that his seller's place

of business is located there." (Pet. App., p. 8) This holding is sound. Any other rule, unless the size of the transaction or the relative size of the parties were elevated to controlling factors, would subject all buyers, including mail order buyers, to suit in distant forums. It is one thing to subject an interstate seller to suit elsewhere; when it deliberately embarks upon an interstate business it takes that risk. It is something else altogether to subject essentially local persons who, of necessity, must buy at least some goods in interstate commerce to the same risk.

Seller has failed to show an actual conflict between the decision of the Seventh Circuit on the facts of this case and the decisions of other federal circuits.

In Cleverock Energy Corp. v. Trepel, 609 F.2d 1358, 1363 (10th Cir. 1979), and In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 232-35 (6th Cir. 1972), there was physical presence by agents of the defendants within the forum state, a factor not present here. Indeed, dictum in In-Flight strongly supports the Seventh Circuit's approach on the facts of this case.

The interest of a state in protecting its citizens against breaches of contract was relied upon in Pedi Bares, Inc. v. P & C Food Markets, Inc., 567 F.2d 933 (10th Cir. 1977). Here, however, Seller was paid in full.

Ajax Realty Corp. v. J.F. Zook, Inc., 493 F.2d 818 (4th Cir. 1972); Shealy v. Challenger Mfg. Co., 304 F.2d 102 (4th Cir. 1962); Product Promotions, Inc. v. Cousteau, 495 F.2d 483 (5th

Cir. 1974; Southern Machine Co. v. Mohasco Indus., Inc., 401 F.2d 374 (6th Cir. 1968); and Electro-Craft Corp. v. Maxwell Elec. Corp., 417 F.2d 365 (8th Cir. 1969);[2] are not in point at all because the plaintiff there was the buyer (licensee) not the seller (licensor), as is the case here.

CONCLUSION

Respondent respectfully submits that Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully submitted

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[2]The most recent Eighth Circuit Decision is clearly in accord with the decision below. See, Iowa Electric Light & Power Co. v. Atlas Corp., 603 F.2d 1301, (8th Cir. 1979.)